86 1937

Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-____

IN THE SUPREME COURT OF THE
UNITED STATES OCTOBER TERM, 1986

SANGER HARRIS, A DIVISION OF FEDERATED
DEPARTMENT STORES, INC.,
PETITIONER

V.

ANN RICHARDS,
TREASURER OF THE STATE OF TEXAS,
RESPONDENT

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant
Attorney General for
Litigation

J. PATRICK WISEMAN
Special Assistant
Attorney General
P.O. Box 12548
Austin, Texas 78711
(512) 463-2120

ATTORNEYS FOR
RESPONDENT

OF COUNSEL:

ANN SCHWARTZ
Office of General Counsel
Texas Department of
Treasury

SUSAN ALBERS
Staff Attorney
Texas Department of
Treasury

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... iii

REASONS FOR DENYING THE WRIT..... 3

I. NO NEW QUESTIONS PRESENTED..... 3

II. NO DISCRETIONARY REVIEW APPROPRIATE 4

CONCLUSION..... 6

CERTIFICATE OF SERVICE..... 7

TABLE OF AUTHORITIES

CASES	PAGE
Gravitt v. Southwestern Bell, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed. 1 (1977).....	3
In re Pennsylvania Co., 137 U.S. 451, 11 S.Ct., 141, 34 L.Ed.2d (1976).....	3
Matthew v. Eldridge, 42A U.S. 319, 96 S.Ct., 893, 47 L.Ed.2d (1976).....	5
Thermtron Products, Inc. v. Hernansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976).....	3, 4
Volvo of America Corporation v. Schwarzer, 429 U.S. 1331, 97 S.Ct. 284, 50 L.Ed.2d 273 (1976).....	3
STATUTES	
28 U.S.C. Section 1447(c).....	4
28 U.S.C. Section 1447(d).....	3, 4
Tex. Prop. Code, Secs. 72.001 *et seq* (Vernons, 1987).....	1

NO. 87-____

IN THE SUPREME COURT OF THE
UNITED STATES OCTOBER TERM, 1986

SANGER HARRIS, A DIVISION OF FEDERATED
DEPARTMENT STORES, INC.,
PETITIONER

V.

ANN RICHARDS,
TREASURER OF THE STATE OF TEXAS,
RESPONDENT

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Ann Richards, Treasurer of the State of Texas, Respondent, by and through her attorney, the Attorney General of Texas, and files this Brief in Opposition.

STATEMENT OF THE CASE

On July 15, 1986, Respondent filed suit in the Texas State Court seeking to enforce her right to audit Petitioner's books and records to assure compliance with the Texas Unclaimed Property Laws, Tex. Prop. Code Ann., Secs. 72.001 *et seq* (Vernon's Supp. 1987). Respondent's state court suit was limited to the issue of the state's right to audit, and raised no federal claims. Petitioner

judicially admits that it has failed and refused to allow such an examination of records.

Four days later, on July 19, 1986, Petitioner made its first attempt to move this simple and straightforward state law matter to federal court when it filed suit against the Treasurer and Texas Attorney General Jim Mattox in the U.S. District Court, Southern District of Texas, Houston Division. This massive suit sought to enjoin the defendants from enforcing the provisions of the Unclaimed Property Law against Federated Department Stores. The Houston District Court dismissed the action, relying on the abstention doctrine (as well as other grounds).

On August 21, 1986, Petitioner again tried to move this controversy to federal court by filing a removal of the state court action to the U.S. District Court for the Western District of Texas, Austin Division. In October, 1986, the Austin District Court remanded this course back to the state court "upon the ground that said cause was removed improperly and without jurisdiction."

In December, 1986, Petitioner appealed District Court's remand order to the Fifth Circuit Court of Appeals. In a *per curiam* opinion dated March 11, 1987, the Fifth Circuit affirmed the District Court's remand and held that the remand order was not subject to challenge in the Court of Appeals. Then, on April 30, 1987, the Fifth Circuit denied Petitioners' Suggestion for Rehearing En Banc, marking the *fourth* time that a Federal Court told Petitioner that this matter should properly be decided in state court.

On June 8, 1987, Respondent was served with Petitioner's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. NO NEW QUESTION PRESENTED

Beginning in 1980 with the case of *In re Pennsylvania Co.*, 137 U.S. 451, 11 S.Ct. 141, 34 L.Ed. 738 (1890) until the 1977 case of *Gravitt v. Southwestern Bell*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed. 1 (1977), the Supreme Court has consistently held that where a district court remands an action to state court on statutory grounds, such as in the instant case, that remand order is unreviewable by appeal, mandamus, or otherwise.

In the intervening years, *Thermtron Products Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976) clarified that where a district court has remanded a case on the basis that it was removed improperly and without jurisdiction, an appellate court may not look behind that order to determine its correctness.

Petitioner argues that *Thermtron, supra* does not apply here because "28 U.S.C. 1447(d) and the decision in *Thermtron* are extreme statements of legislative and judicial policy...that are subject to and circumscribed by the procedural due process and hearing guaranty of the Fifth Amendment to the Constitution of the United States." [Petition for a Writ of Certiorari, at pg. 12]. Petitioner attempts to bootstrap exceptions where none exist. The case cited above anticipate no such exceptions. In fact, the Supreme Court has twice stated that even erroneous remand decisions are unreviewable. *Thermtron, supra.* and *Volvo of America Corporation v. Schwarzer*, 429 U.S. 1331, 97 S.Ct. 284, 50 L.Ed.2d 273 (1976).

Volvo involved the district court's remand of a state law antitrust action on the grounds that the

district court lacked jurisdiction over the matter. The remand order cited specifically to 28 U.S.C. Section 1447(c). The Defendant sought appellate review, arguing that the district court incorrectly analyzed the jurisdictional question and, therefore, the order remanding the action was not authorized by 28 U.S.C. Sec. 1447(d). In holding that the remand order was not subject to review, the Supreme Court stressed that review of an order of remand where an action is "removed improvidently and without jurisdiction" is presumptively barred by Sec. 1447(d), whether or not the district court was correct in its analysis:

> "Applicant's position would mean that any allegedly erroneous application of Sec. 1447(c) would be reviewable by writ of mandamus, leaving the Sec. 1447(d) bar extent only in the case of allegedly proper applications of Sec. 1447(c), a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron*." 97 S.Ct. at 285.

Additionally, as the Fifth Circuit correctly wrote in this case: "The *Thermtron* Court does not say that we cannot review orders purporting to remand on this basis on certain grounds, or for certain faults; for constitutional infirmities, but not for statutory ones: it says we cannot review them *at all*. There it ends."

II. NO DISCRETIONARY REVIEW APPROPRIATE

As provided in Supreme Court Rule 17, review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons. In this case such reasons do not exist.

Petitioner submits that the Court should review this matter because the remand other allegedly jeopardized Petitioner's property interest by denying it access to the Federal Courts. Petitioner's property interest in this matter relates to the underlying unclaimed property, not to the choice of forum. Clearly, since *Matthew v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the status of procedural due process has been that the litigant is entitled to notice and a fair hearing. This court has consistently held that the state courts can provide adequate due process. Petitioner will have its guaranteed notice and hearing before the state district court.

Respondent would point out that Petitioner, in order to delay any hearing on the merits in state court, has attempted to bring this matter before three federal courts in the last year. Petitioner has been told in four separate opinions that this matter belongs in state court. Thus if delay is what Petitioner has sought, then Petitioner has already achieved its goal. Respondent believes it is now appropriate and necessary to obtain an order seeking an audit of Respondent's books and records. It is not time for Respondent to have her day in court.

Petitioner's interest in delaying an adjudication on the merits through procedural machinations is an abuse of the judicial system and is simply not important enough for the Supreme Court to overrule a century of precedent. Accordingly, Respondent respectfully urges that the petition for writ of certiorari be denied.

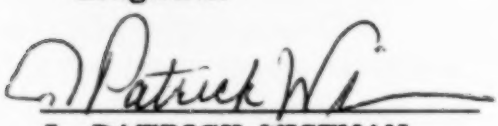
CONCLUSION

WHEREFORE, for all these reasons, Respondent pray that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant
Attorney General for
Litigation



J. PATRICK WISEMAN
Special Assistant
Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Brief in Opposition was sent U.S. Mail, certified, return receipt requested to:

Charles J. Sullivan
Anthony J. Sadberry
Sullivan, King & Sabom
P.O. Box 2482
Houston, Texas 77252

on this the 7th day of July, 1987.

J. PATRICK WISEMAN
Special Assistant
Attorney General